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NO. 789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS COMMONWEALTH EDISON COMPANY, ET AL. BRIEF IN OPPOSITION

(Names and Addresses of Counsel Appear at the end of this Brief)

TWENTIETH CENTURY PRESS, INC., CHICAGO 60605

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The petition presents "an important question of federal law which has not been, but should be settled, by this court . . ." (Rule 19). This the respondents do not deny nor do they deny that it involves a significant antitrust statutory provision never considered by this court (Petition, pp. 7-8). Despite the findings of both courts below that the question presented is controlling and should be settled before trials are begun, respondents urge that petitioners should be deemed to have waived the opportunity to apply to this Court for review because they used the time the statute allows for filing their petition.

I. Petitioners should not be penalized for complying with the statute. It should be plain that they waited the full

statutory period in the hope that decisions would be rendered in the cases involving the same issue pending in two other circuits.[1]

The question presented has been decided favorably to petitioners by three district courts, including Judge Robson's decision below. When the Seventh Circuit reversed on the basis of a self-contradictory rationale, petitioners asked, and because of the strong and cogent dissent written by Judge Knoch, had reason to hope for rehearing. Forced by the majority's denial of that petition to come to this Court, petitioners naturally waited for decisions in the other circuits. Had one of those decisions been affirmed within the statutory period ending January 28, 1964, petitioners would have been able to show the direct conflict which respondents seem to view as creating a right to the granting of the petition. Even if both decisions had been unfavorable, the Court's time would have been conserved by the filing of simultaneous petitions in all cases. Petitioners were certainly not unreasonable in hoping for decisions before January 28, 1964 on appeals initiated at about the same time as theirs and argued on May 1, 1963 (Fifth Circuit) and November 15, 1963 (Ninth Circuit). But, as the time for filing drew near and decisions in the other circuits were still outstanding, petitioners had to decide either to file a petition in these cases or to acquiesce

1. Department of Water & Power v. Allis-Chalmers Mfg. Co., Trade Reg. Rep. (1963 Trade Cas.) ¶70,656 (S.D. Cal. 1963), application for leave to file interlocutory appeal granted Mar. 8, 1963 (9th Cir., No. 18475); City of San Antonio v. General Elec. Co., No. 3063 and related cases (W.D. Tex., Dec. 7, 1962), application for leave to file interlocutory appeal granted Jan. 11, 1963 (5th Cir., No. 20279).

in an unfavorable decision which places a plainly erroneous construction on an important antitrust statutory provision.

There is no basis for respondents' assertion that granting the petition will delay trials of cases pending in the Northern District of Illinois. Petitioners know of no May 1 target date for the trial of any of these cases. Certainly no such date has been established by the district court below. On the contrary, Judge Robson has certified, and the Court of Appeals on January 20, 1964 agreed to review, another controlling question of law under the Interlocutory Appeals Act, and the District Court has informed the parties that no trial will take place until that new issue shall be resolved on appeal. The time permitted for briefing on appeal of that new issue will not expire until about the middle of May. After briefs are filed, oral argument will be held and in due course a decision rendered.

2. The respondents' unwarranted and surprising statements as to the trial schedule in these cases are apparently occasioned by their inability to deny that the petition presents an important question that should be settled by this Court—one that has been erroneously decided below. Indeed, the decision below has forced respondents to an interpretation of the estoppel provision of Section 5(a) (see Brief in Opposition, pp. 9-11) which amounts to a demonstration of the fallacy of that decision by the classic method of *reductio ad absurdum*.

For under that decision, respondents can instill the proviso to Section 5(a) with meaning and purpose only by asserting, as they do, that judgments based on pleas of *nolo contendere* create an estoppel within the meaning of the proviso. That assertion flies in the face of the reported decisions recognizing that *nolo* judgments are excluded from Section 5(a) by virtue of its estoppel clause.[2] That the doctrine of collateral estoppel, involving adjudicated *facts*, is quite different and distinct from the doctrine of *res judicata*, involving the adjudication of *rights* with respect to a particular issue, is made plain in the very cases respondents cite. See, e.g., *United States* v. *International Bldg. Co.*, 345 U.S. 502, 506 (1953). It is the determination of evidentiary facts with which Section 5(a), by virtue of its language, its purpose, and its content, is concerned. And the clear holding of this Court in *Emich Motors* v. *General Motors*, 340 U.S. 558, 568 (1951) is that "the evidentiary use which may be made under §5 of the prior [criminal judgment] . . . is . . . to be determined by reference to the general doctrine of estoppel." See also *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 315 F.2d 449, 454 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); *Buckhead Theatre Co.* v. *Atlanta Enterprises, Inc.*, Trade Reg. Rep., ¶71,006 (5th Cir., Jan. 21, 1964). Under that general doctrine *nolo* judgments create no estoppel

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2. Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 378 (D. Minn. 1939); Barnsdall Ref. Corp. v. Birnamwood Oil Co., 32 F. Supp. 308, 313 (E.D. Wis. 1940); Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359 (W.D. Ky. 1942); United States v. Jones, 119 F. Supp. 288, 290-91 (S.D. Cal. 1954); United States v. B. F. Goodrich Co., Trade Reg. Rep. (1957 Trade Cas.) ¶68,713 at p. 72,879 (D. Colo. 1957); United States v. Cigarette Merchandisers Ass'n., 136 F. Supp. 212, 213 (S.D. N.Y. 1955); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D. N.Y. 1955).

Hudson v. United States, 272 U.S. 451, 455 (1926); *United States v. Norris*, 281 U.S. 619 (1930).

3. It is impossible to follow respondents' argument on the estoppel provision largely because its premises are wrong. No case supports the threshold statement that every civil consent decree entered after testimony has been taken is admissible in a later treble damage action as prima facie evidence under Section 5(a). Petitioners are aware of only one case in point, Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359 (W.D. Ky. 1942), and it held to the contrary; on motion to strike, an equity consent decree was held not to be exempt from the provisions of Section 5 by reason of its proviso because testimony had been taken; at trial, however, it was held inadmissible under Section 5 because it created no estoppel. The cases respondents cite (Brief in Opposition, p. 10 n. 6) do not support their statement. They involved the *Paramount* consent decrees based on trial court findings of fact, made after full trial and upheld by this Court. The consent decrees were entered after that trial and appeal, but before commencement of trial on a limited remand. See DeLuxe Theatre Corp. v. Balaban & Katz Corp., 95 F. Supp. 983, 985-86 (N.D. Ill. 1951); Grand Opera Co. v. Twentieth Century-Fox Film Corp., 137 F. Supp. 305, 308 (E.D. Ill. 1955); Webster Rosewood Corp v. Schine Chain Theatres, 157 F. Supp. 251, 256 (N.D. N.Y. 1957). Most defendants in the later treble damage suits in which the consent decrees were offered under Section 5 made no claim that the consent decrees were inadmissible because of the estoppel provision; obviously, the decrees created an estoppel as to the facts judicially determined—as, indeed, appears in two of the cases cited by respondents (p. 10 n. 6) in which the decrees were admitted only for the limited purpose of proving such relevant facts as the decrees would estop between the original parties. Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 853 (8th Cir. 1952); Webster Rosewood Corp. v. Schine Chain Theatres, 157 F. Supp. 251, 255-256 (N.D. N.Y. 1957). Defendants in some cases, including those cited by respondents, argued that the decrees should be entirely excluded under the proviso because they were entered before testimony was taken on the remand. But because the remand was for determination of limited issues, and not for a new trial, the courts uniformly rejected the suggestion that there had been no testimony.

Accordingly, for the reasons stated here and in their petition, petitioners ask that their petition be granted.

Respectfully submitted.

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